

USAWC STRATEGY RESEARCH PROJECT

**THE NATIONAL SECURITY STRATEGY UNDER  
THE UNITED NATIONS AND INTERNATIONAL LAW**

by

Colonel Steven L. Kenney  
United States Army

Dr. Gabriel Marcella  
Project Advisor

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U.S. Army War College  
CARLISLE BARRACKS, PENNSYLVANIA 17013

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## ABSTRACT

AUTHOR: Colonel Steven L. Kenney

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In response to an international order of growing terrorism, trans-national crime, "rogue" and "failed" states potentially armed with WMD and will to use them, the National Security Strategy has invoked an escalation of the right of self-defense as it prosecutes the Global War on Terrorism. Termed preemption, it is in fact a policy of preventive self-defense.

The National Security Strategy policy of preventive self-defense has been generally condemned throughout the international arena and also within the U.S. However, this condemnation is not universal. This study will show that a significant amount of validity can be conferred on the National Security Strategy due to: (1) the failure of the UN to enforce its charter, essentially abandoning the purposes of the UN (2) the continued use and threat of use of preventive self-defense by many states and previous U.S. administrations (3) state practice (4) customary international law (5) the slowly changing body of international law that is responding to and inferring more significance due to the rise of transnational terrorists and WMD proliferation over state sovereignty.



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## THE NATIONAL SECURITY STRATEGY UNDER THE UNITED NATIONS AND INTERNATIONAL LAW

We make war so that we may live in peace.

—Aristotle

In response to an international order of growing terrorism, trans-national crime, "rogue" and "failed" states potentially armed with WMD and will to use them, the National Security Strategy has invoked an escalation of the right of self-defense as it prosecutes the Global War on Terrorism. Termed preemption, it is in fact a policy of preventive self-defense.

The National Security Strategy policy of preventive self-defense has been generally condemned throughout the international arena and also within the U.S. However, this condemnation is not universal. This study will show that a significant amount of validity can be conferred on the National Security Strategy due to: (1) the failure of the UN enforce its charter, essentially abandoning the purposes of the UN (2) the continued use and threat of use of preventive self-defense by many states and previous U.S. administrations (3) state practice (4) customary international law (5) the slowly changing body of international law that is responding to and inferring more significance due to the rise of transnational terrorists and WMD proliferation over state sovereignty.

### THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA

In the Overview of The National Security Strategy of the United States of America, September 2002, President George W. Bush put forth a number of idealistic aspirations. These aspirations were not just for the United States of America, but also for the entire world. For example:

"champion aspirations for human dignity;"

"strengthen alliances to defeat global terrorism to prevent attacks against us and our friends;"

"work with others to defuse regional conflicts;"

"ignite an era of global economic growth through free markets and free trade"

"expand the circle of development by opening societies and building the infrastructure of democracy;"<sup>1</sup>



Each of these areas was thoroughly expanded and developed within the National Security Strategy and they made up a significant portion of the document. While quite laudable, areas such as these generated a muted level of interest and discussion. The overwhelming attention of both the United States and the international community focused almost singularly on another significant tenet espoused throughout the document.

"Identifying and destroying the threat before it reaches our borders . . . we will not hesitate to act alone if necessary, to exercise our right of self-defense by acting preemptively against such terrorists."<sup>2</sup>

"The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction---and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."<sup>3</sup>

"The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most destructive technologies the United States cannot remain idle while dangers gather."<sup>4</sup>

#### **ANTICIPATORY? PREEMPTION? PREVENTIVE?**

The words anticipatory, preemptive, and preventive when associated with the self-defense of a nation generated extensive debate before the United Nations was even a dream. However, there is no need for an exhaustive review and discussion of this history to discern an opinion or conclusion on what these terms have come to mean today within the international community and the United Nations. Current publications from the United States Department of Defense and the United States Army, Judge Advocate General's School, provide definitions quite acceptable to the vast majority of international legal scholars and members of the United Nations.

From the Department of Defense, Dictionary of Military and Associated Terms.

"Preemptive Attack – (DOD) An attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent."<sup>5</sup>

"Preventive War – (DOD) A war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk."<sup>6</sup>

From the United States Army, Judge Advocate General's School, Operational Law Handbook, 2002.

"Anticipatory self-defense finds its roots in the 1842 *Caroline* case and a pronouncement by then Secretary of State Daniel Webster that a state need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation."<sup>7</sup>

From these definitions, one can discern an obvious hierarchy based on the level of imminence the threat presents.

1. Anticipatory self-defense associated with an "instantaneous" or truly, imminent threat.
2. Preemptive attack associated with "incontrovertible evidence that an enemy attack is imminent."
3. Preventive war associated with an "inevitable" future threat, but not linked in any way with the concept of an imminent threat.

One can form an association between anticipatory self-defense and preemptive attack based on their respective references to a requirement for some level of an imminent threat. Based on this requirement of imminence, the distinction between anticipatory self-defense and preemptive attack has become blurred and these terms are often used interchangeably. However, the lack of any reference to an imminent threat in the definition of preventive war would clearly distinguish it from anticipatory self-defense and preemptive attack.

Interestingly, a review of the use of the words anticipatory and preemptive in the National Security Strategy reveals an obvious disconnect with the Department of Defense and United States Army, Judge Advocate General definitions. In most cases "preventive" can be substituted for anticipatory and preemption within the National Security Strategy and the document is transformed to agree with these definitions.

For the purposes of this paper, it will be stipulated that when the National Security Strategy of the United States uses the words anticipatory and preemption in the context of the nation's self-defense, it is in fact referring to concepts that are more commonly accepted as preventive self-defense.<sup>8</sup>

While the legality of initiating the use of force in self-defense remains an area of much debate within the United Nations and international law, one can clearly delineate a significant difference in this arena when comparing the use of anticipatory/preemptive to preventive. In fact, it is quite evident that most of the world (including much of the United States) would support the argument that the use of preventive in the context of self-defense is not a matter of

self-defense at all. The vast majority of legal debate, argument, and opinion declares that the concept of preventive self-defense is illegal under international law and the Charter of the United Nations.

One might easily dismiss the validity of the National Security Strategy based on the above conclusion. However, international law and the United Nations have been and remain a dynamic entity. Taking a stance in this arena is an open invitation for a debate. Perhaps there is a future for the National Security Strategy.

## **USE OF FORCE IN SELF-DEFENSE UNDER THE PROVISIONS OF THE CHARTER OF THE UNITED NATIONS**

A nation and its right of self-defense is a controversial and active part of the international legal debate, even more than 50 years since most of the world's nations became signatories of the charter of the United Nations. Why? Because the world has suffered many conflicts in the past 50 plus years and self-defense is claimed as a factor in most of them. Self-defense of a nation remains the most common legal justification under international law and the United Nations for the use of coercive force between states.<sup>9</sup>

Under the charter of the United Nations, the generally accepted sections applicable to the use of force in self-defense are:

Chapter One, Article 2 (Principles), Paragraph 4:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>10</sup>

Chapter 7 (actions with respect to threats to the peace, breaches of peace, and acts of aggression), Article Fifty-One:

"Nothing in the Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."<sup>11</sup>

These two articles appear fairly straightforward. They could be boiled down to no use of force except in self-defense after an attack and then only until the Security Council takes necessary measures to "restore international peace and security." There exists a substantial amount of legal opinion in the arena of international law that supports this simple, somewhat literal, interpretation of these articles. Any use of force outside of this interpretation would be

considered a violation of international law and the charter of the United Nations. Is it really this simple?

At least in practice, no. Columbia University international security policy expert Richard K. Betts wrote, "I am aware of no case in which international law has blocked a decision to wage war – that is, a case in which a government decided that strategic necessity required war yet refrained because international law was deemed to forbid it." He further notes that once the decision is made by a state to go to war, "they find a lawyer to tell the world that international law allows it."<sup>12</sup>

## **RESTRICTIONISTS VS. COUNTER-RESTRICTIONISTS**

The debate on the self-defense of a nation under Articles 2 (4) and 51 has developed along 2 schools of thought, the Restrictionists and the Counter-Restrictionists.<sup>13</sup>

### **RESTRICTIONISTS**

The Restrictionists cite the protections offered under Article 2 (4) and would claim that the renunciation of the use of force under Article 2 (4) by the signatories of the United Nations Charter places an overarching prohibition on the use of force by the individual states. Therefore, all states should be safe from "the threat or use of force."<sup>14</sup> If by chance, enforcement of Article 2 (4) by force is required, the use of force is a matter solely for the Security Council, provided for under various articles in Chapter Seven, including Article 42 " . . . the Security Council . . . may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."<sup>15</sup>

Building on this interpretation, the Restrictionists adhere to a literal reading of Article 51 as the only basis for the use of force outside of an authorization by the Security Council. They assert that Article 51 provides for the use of force only in "self-defence" and only when an actual "armed attack" has occurred.<sup>16</sup> In other words, a sovereign nation could only use force in self-defense after it was attacked. Additionally, this use of force is limited to the defense and security of its sovereignty, typically expressed as its borders. This narrow interpretation, requiring the impending victim to actually suffer an armed attack before responding, is the current position of most all European international law commentaries and the majority of American commentaries.<sup>17</sup>

Furthermore, once the Security Council has addressed a situation, the use of force in any manner is totally in the hands of the UN and the Security Council. Should the Security Council decline to take action, there is no other recourse for the victim. Some have taken the Restrictionist school of thought to such an extreme that should the Security Council decline to

take action, the victim is no longer authorized to even defend itself by force.<sup>18</sup> Additionally, the Restrictionists assert that in the case of a humanitarian intervention to prevent genocide or to accomplish a hostage rescue, the use of force must be authorized by the Security Council.<sup>19</sup> Unfortunately, the Security Council will often go to extraordinary lengths to keep from interfering with the sovereignty of a state and fail to intervene in cases such as genocide. Recent examples include Rwanda and Kosovo. Such a position would appear to be in direct contravention to the purposes of the UN under Article 1 ("prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace;" "solving international problems of an economic, social, cultural, or humanitarian character")<sup>20</sup>

The logic of the Restrictionist position is predicated on a desire to avoid the use of armed force, if at all possible. Requiring an "armed attack" to resort to force outside of the authority of the Security Council minimizes ambiguity, making unacceptable uses of force clear to all the world's nations.<sup>21</sup> In practice, the Restrictionist school of thought has proven to be quite idealistic. The United Nations has a poor record of preventing "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>22</sup>

#### COUNTER-RESTRICTIONISTS

The Charter of the United Nations contains sufficient ambiguity to allow for differing interpretations and therefore different views. Perhaps, if the United Nations had proven to be more effective, there would be no counter to the Restrictionists. Unfortunately, that is not the case. Hence, a less restrictive position is argued by the Counter-Restrictionist school of thought.

The Counter-Restrictionist's argument includes a broad range of positions. They also cite Article 2 (4) and Article 51, drawing different interpretations by focusing on different parts and on less literal interpretations:

1. Article 2 (4) – "All members shall refrain . . . from the threat or use of force . . . in any other manner inconsistent with the Purposes of the United Nations."
2. Article 51 – "Nothing in the Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs;"

The most basic and least controversial Counter-Restrictionist view relies on a less literal interpretation of Article 2 (4). It claims that as long as the use of force is consistent "with the Purposes of the United Nations," there is no prohibition on the use of force. For example, an intervention in a humanitarian crisis such as an impending genocide. It would appear that the

Security Council is authorized to take action to intervene under Article One, "The Purposes of the United Nations are: ". . . solving international problems of an economic, social, cultural, or humanitarian character".<sup>23</sup> However, there are recent examples previously noted where the United Nations Security Council has failed to take action in cases such as genocide. Even in the face of untold human misery and death, the Security Council has demonstrated it may choose to emphasize a different portion of Article 2 (4), "refrain . . . from the threat or use of force against the territorial integrity . . . of any state."<sup>24</sup> It chooses to stand on preservation of "territorial integrity" rather than address situations that are clearly within the stated purposes of the United Nations.<sup>25</sup> Situations such as this enable the Counter-Restrictionists to argue that as long as there is no ulterior motive such as seizure of territory, use of force to intervene for humanitarian purposes is acceptable under the Charter of the United Nations.

A more controversial extension, but widely accepted extension of the Counter-Restrictionist view relies on a less literal interpretation of a portion of Article 51, " . . . the inherent right of . . . self-defense."<sup>26</sup>

The logic of this view is that Article 51 simply recognizes "the inherent right of self-defense" that was customary in international law long before the formation of the United Nations.<sup>27</sup> Counter-Restrictionists hold that to require a state to suffer an attack before it could defend itself is absurd and was not the intention of the framers of the UN Charter. Furthermore, they assert that the UN Charter does not override and eliminate anticipatory self-defense as it had been previously defined in customary international law by the 1842 *Caroline* case.

This version of the Counter-Restrictionist argument has been traditionally supported by the United States. It does not argue for the right of a signatory of the UN Charter to use either preemptive or preventive self-defense as espoused in the National Security Strategy. Can the case be made that the US National Security Strategy and the concept of a preventive self-defense should become the latest expansion of the Counter-Restrictionist View?

#### **UNITED NATIONS CHARTER AND THE USE OF FORCE - FRAMER'S INTENT**

Professor Timothy Kearly, University of Wyoming School of Law, conducted an interesting analysis of the 1967 book, Foreign Relations of the United States, which contained the minutes of the United States delegation to United Nations Conference on International Organization (UNCIO), held in San Francisco, April 25 - June 25, 1945.<sup>28</sup> The UN Charter's final form was constructed at this conference. The minutes covered the U.S. delegation's internal meetings and meetings with the other "Great Powers" who would eventually become the five permanent members of the United Nations Security Council. His article, "Regulation of Preventive and

Preemptive Force in the United Nations Charter: A Search for Original Intent," conducted an extensive review of these minutes, focusing on the discussions concerning the development of the provisions on the use of force in self-defense under the UN Charter. His purpose was to determine if one could ascertain the intent of the framers of the UN Charter from these minutes.

The intent of the framers is important because it is often invoked in the international arena to support a position in the contentious arguments over the use of force in self-defense. Kearly provides an example of a modern Restrictionist invoking the intent argument. Herr Professor Dr. Albrecht Randelzhofer of the Berlin Free University, Institute for International Studies wrote: Because Article 2 (4) "broadly prohibits the use of force ("the threat or use of force") while the later article [Article 51] authorizes self-defense only in the case of armed attack 'the stunning conclusion is to be reached that any state affected by another state's unlawful use of force not reaching the threshold of an armed attack, is bound if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force . . . **this at first sight unacceptable result is undoubtedly intended by the Charter**, since the unilateral use of force is meant to be excluded as far as possible."<sup>29</sup> (emphasis added)

One could dismiss information derived from sources such as minutes as they are not verbatim transcripts or official records.<sup>30</sup> However, Article 32 of the Vienna Convention on the Law of Treaties provides the basis for the use of information such as the minutes in an analysis of this nature: "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."<sup>31</sup>

The analysis reveals that there were significant differences among the Great Powers. They all brought their own concerns that didn't always coincide with the other's concerns. This is reflected in Kearly's conclusion that "there were substantial, unresolved disagreements . . . about the circumstances under which states should be able to use force without Security Council approval . . . combined with time pressures . . . [this] resulted in Charter use of force provisions that are imprecise, somewhat inconsistent, and open to interpretation." He goes on to note "the drafters were not concerned with their lack of precision because they assumed the permanent members of the Security Council would negotiate judgments concerning uses of force case by case in good faith."<sup>32</sup>

This conclusion confirms that considerable ambiguity is built into the charter. The ambiguity was acceptable to the framers because they wanted an agreement; without the ambiguity, it is likely there would be no agreement due to the differing concerns and motives of

the Great Powers. The fact that the framers introduced ambiguity reveals exactly what the framers intended.

Kearly cites Hans Kelsen's authoritative research of the charter of the United Nations, The Law of the United Nations (1951): "The fact that the wording of a legal norm allows several interpretations proves that its actual framer . . . has not been able or willing to express his intention . . . . The ambiguity of a legal text moreover is sometimes not the involuntary [sic] effect of its unsatisfactory wording but a technique intentionally employed by the legislator, who, for some reason or another, could not decide between two or more solutions . . . and left the decision to the law applying organs."<sup>33</sup>

This indicates that the framers intended the law applying organ, i.e. the Security Council to make decisions case by case in good faith as the need arose in ambiguous situations. Conversely, it does not appear the framers intended international jurists to interpret the charter and establish new legal principles.

The following conclusions were made by Kearly:

1. Preventive self-defense was to be eliminated except as authorized by the Security Council under Chapter 7 and as provided for under Article 107 concerning former enemy states.
2. Article 2 (4) was intended to be a broad renunciation of the use of force in international relations.
3. Force could be used if the Security Council were to fail in dealing with the dispute or if it were to become deadlocked.
4. Anticipatory self-defense as provided for under customary international law was not changed other than it should only be utilized if it was consistent with the purposes of the UN.
5. Preemptive self-defense was not addressed and therefore is not prohibited as long as its use is consistent with the purposes of the UN.
6. Success of the UN depended on mutual good faith among the members of the Security Council in pursuing the goals of the UN.<sup>34</sup>

## **PREVENTIVE SELF-DEFENSE**

Critics of the National Security Strategy typically renounce the U.S. as embarking on unilateral, hegemonic mission to overturn the guarantee of international peace secured in 1945 by the UN Charter. They cry that the concept of preventive self-defense was eliminated for good on that day. Noam Chomsky, a prominent MIT professor and political dissident recently



wrote, "Preventive war is, very simply, the 'supreme crime' condemned at Nuremburg."<sup>35</sup> A rather harsh condemnation considering that the concept of preventive self-defense is part of the UN Charter. Critics of the National Security Strategy such as Chomsky typically ignore or summarily dismiss the fact that in 1945, the UN Charter actually contained a provision authorizing the very crime they denounce so vehemently, preventive self-defense.

Chapter 17 (Transitional Security Arrangements), Article 107:

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.<sup>36</sup>

Article 107 was created due to the desires of the Soviet Union, Great Britain and France. They had suffered greatly in the two World Wars at the hands of aggressive powers that did not respond to peaceful efforts to resolve matters. Kearly in his previously mentioned review concluded, "With respect to preventive force . . . the charter's drafters intended to prohibit such assertive action except as specifically authorized in the form of . . . Article 107 actions against former enemy states." They wanted "an explicit authorization under the charter to use force preventively against their most likely foes, but did not want other states to have that authorization."<sup>37</sup>

There is some ambiguity in Article 107 and a restrictionist might propose to limit Article 107 to actions "taken or authorized as a result of that war." This was addressed in 1951 by Hans Kelsen in a legal analysis of fundamental problems with the UN Charter. He concluded that it would be impossible to limit the use of Article 107 precisely due to the very ambiguity of this phrase.<sup>38</sup>

An additional conclusion from Kearly's review, the framers "assumed the permanent members of the Security Council would negotiate judgments concerning uses of force case by case in good faith." The framers understood the concerns of the European allies and they supported this article based on good faith. Although Article 107 does not apply today, it has to be recognized that preventive self-defense is not a new concept to the UN and its members.

Preventive self-defense as expressed in the National Security Strategy could be fairly evaluated on a case-by-case basis within the Security Council to determine if it is in concert with the purposes of the UN. Just as it was when Article 107 was created. For the UN and international community to laconically declare that any use of preventive self-defense is a violation of the UN Charter simply ensures they won't be consulted and opens the door to the National Security Strategy option of unilateral action.

Interestingly, it would be a mistake to believe the U.S. is the sole keeper of the preventive self-defense flame. In September 2003, the French Ministry of Defense stated, "Outside our borders, within the framework of prevention and projection-action, we must be able to identify and prevent threats as soon as possible. Within this framework, possible preemptive action is not out of the question, where an explicit and confirmed threat has been recognized."<sup>39</sup> Although the French Ministry calls for "preemptive action," the use of "explicit and confirmed threat" only indicates only a clear, unambiguous threat. There is no requirement expressed for the threat to be of an imminent nature. Thus, this statement appears to be indicating that France is prepared to take actions of a preventive nature in self-defense. More similarity to the National Security Strategy is found in the French 2003–2008 Military Program Bill of Law, "especially as transnational terrorist networks develop and organize outside our territory, in areas not governed by states, and even at times with the help of enemy states."<sup>40</sup>

## **STATE PRACTICE**

In 1970 Thomas Franck, a renowned leader in the field of international law and the author of over 20 books on the subject, quipped "the high-minded resolve of Article 2 (4) mocks us from its grave." He pointed out that in the first 25 years of the UN, there were "one hundred separate outbreaks of hostility between states. In only one occasion was the UN "able to mount a collective enforcement action. The eternal failure of the UN to enforce its mandate results in an endemic use of force self-defense. There is no way to establish aggressor and aggrieved in the international system resulting in both parties claiming to have used force only in self-defense."<sup>41</sup>

30 years later, Franck's observation remains the status quo. In 1999 alone, there were 44 countries involved in conflict. Of the 44 countries, 20 suffered fatalities of at least 1000 and many suffered even higher numbers.<sup>42</sup>

The eminent author and Professor of Law and the Fletcher School of Law and Diplomacy, Michael Glennon, updated the record regarding hostility between states in 2002. "Between 1945 and 1999, two-thirds of the members of the United Nations-126 States out of 189-fought 291 interstate conflicts in which over 22 million people were killed."<sup>43</sup>

Glennon related congressional testimony by former Secretary of Defense, William Perry, who stated "we will attack the launch sites of any nation that threatens to attack the U. S. with nuclear or biological weapons."<sup>44</sup> The reservation of the right of first use of nuclear weapons has always been the stated policy of the members of the Security Council. This would clearly violate Article 51 as an act of preventive self-defense. The very threat itself is a violation of

Article 2 (4). Glennon concluded that "international 'rules' concerning use of force are no longer regarded as obligatory by states," declaring that Article 2 (4) and Article 51 are invalidated by state practice.<sup>45</sup>

Franck recognized that the UN Charter did not have the mechanisms required for the modern world. The framers of the UN Charter were building on their experience, "large military formations preceded by mobilization and massing of troops." This allowed time for preparation and negotiation and was the type of aggression the framers intended to address by Article 2 (4) and Article 51. Franck noted "Modern warfare, however, has inconveniently by-passed these Queensberry-like practices. One too small and the other too large to be encompassed effectively . . . first, wars of agitation, infiltration and subversion carried on by proxy through national liberation movements; and second, nuclear wars involving the instantaneous use, in a first strike, of weapons of near-paralyzing destructiveness."<sup>46</sup>

The National Security Strategy is making the same argument today. However, the environment is even more dangerous as the real fear is the "One too small" (terrorists) could come to posses and use the "weapons of near-paralyzing destructiveness." Article 2 (4) and Article 51 simply aren't designed to address this threat and the Security Council has refused to consider it.

## **INTERNATIONAL LAW**

Customary international law is not necessarily what is written down, but what states actually practice.<sup>47</sup> Accepting that preventive self-defense is illegal under the UN Charter, use of preventive self-defense as proposed under the National Security Strategy would be considered illegal. However, if preventive self-defense reflects customary international law, it could be considered lawful.<sup>48</sup>

Georgetown University professor, author and international law expert Anthony Clark Arend states, "International law is created through consent of states expressed through treaties and customs." If conflicts arise concerning treaties (such as the UN Charter) and customs, the "conflict is resolved by determining the rules to which states consent at the present time." Arend lists 19 incidents from 1948 to 1999 where force has been used against "the political independence and territorial integrity of states" without the authorization of the Security Council and where no reasonable claim of self-defense could be made. Arend notes incidents such as the Soviet invasion of Czechoslovakia in 1948, the Argentine invasion of the Falkland Islands in 1982, the U. S. invasion of Grenada in 1983, the Iraqi attack on Kuwait in 1990, the NATO/U.S. actions against Yugoslavia in the Kosovo situation in 1999 and states that there have been

"numerous acts of intervention in domestic conflict, covert actions, and other uses of force" throughout this period. According to Arend, "Given this historical record of violations, it seems very difficult to conclude that the charter framework is truly controlling of state practice, and if it is not controlling, it cannot be considered to reflect existing international law."<sup>49</sup>

Arend concludes that a customary prohibition on the use of force solely for annexation of territory such as Kuwait in 1990 remains under current customary law. However, current customary international law otherwise bears no resemblance to any prohibition contained in Article 2 (4) and that "For all practical purposes, the UN Charter framework is dead." He adds that since the Article 2 (4) is not reflected in state practice, "the Bush doctrine of preemption does not violate international law."<sup>50</sup>

## **THE FUTURE OF INTERNATIONAL LAW**

Michael N. Schmitt, Professor of International Law at the George C. Marshall European Center for International Affairs, conducted an extensive study on the response of international law to conflict over time. Law is not static; it is dynamic, responding and adjusting to the community on whose behalf it operates. It does not respond on a case-by-case basis, but moves in a general direction which can be predictive of its future.<sup>51</sup> Professor Schmitt offers a compelling analysis that indicates the international community may already be moving in a direction that will accommodate the National Security Strategy under international law.

In 1986, the U.S. launched Operation El Dorado Canyon, attacking terrorist facilities in Libya in response to the bombing of a Berlin discotheque by a group supported by Libya. Self-defense under Article 51 was the justification offered by the U.S. The attack was overwhelmingly condemned. The General Assembly passed a resolution "deploring" the action and the only support for the U.S. was from Great Britain and Israel.<sup>52</sup>

In 1998, after bombings of U.S. embassies in Kenya and Tanzania, the U.S. launched cruise missiles against a pharmaceutical plant in Khartoum that was allegedly producing chemical weapons that could fall into terrorist's hands. Again, self-defense under Article 51 was the justification. In this case there was significant support for the U. S. and there was no clear consensus that the violation of Sudan's sovereignty was illegal. Most significantly, the criticism was not focused on the fact that the U.S. had launched the attack, the concern focused on whether the target was actually involved in terrorism. The issue at hand was whether the U.S. possessed sufficient evidence to attack the pharmaceutical plant, not the legal authority to attack. This illustrates a change in the community attitude towards use of force against terrorist targets.<sup>53</sup>

One can detect a similar response to the actions of the U.S. in Iraq. Before the initiation of hostilities, there was significant discussion and maneuvering on the legality of the U.S. action against Iraq. However, the current discussion and condemnation for the most part centers on the fact that no WMD has been found. Again, not whether the U.S. had the legal authority to act against the Iraqi regime, but that there was insufficient evidence.

Professor Schmitt proposes a legal basis for the violation of the territorial integrity in the pursuit of terrorists, citing the well known *Caroline* case as the precedent. Canadian rebels were operating from the U.S. and despite British demands, the U.S. either refused or failed to prevent their activities. When the U.S. failed or was unable to ensure criminal activity in the U.S. did not affect Canada, the British violated U.S. sovereignty in self-defense. Further support for this premise is provided by the *Lotus* case involving piracy in 1927 and John Bassett Moore's classic opinion, "It is well settled that a state is bound to use due diligence to prevent commission within its dominions of criminal acts against another nation or its people."<sup>54</sup>

Schmitt proposes a modification to the concept of imminency. First, he holds that imminency must accommodate the principle of self-defense. He submits that imminency should be defined as "the last viable window of opportunity, the point at which any further delay would render a viable defense ineffectual . . . . Any other interpretation would gut the right of self-defense."<sup>55</sup>

On the subject of preemption, he states that the condemnation of such a policy is based on the fact that terrorist attacks are mischaracterized as isolated incidents. Considering al-Qa'ida for example, which has been involved in a terror campaign since 1993. "Once a terrorist campaign is launched, the issue of preemption becomes moot because an operation already underway cannot, by definition, be preempted."<sup>56</sup> Nor would a response be considered preventive in nature.

Schmitt's conclusion, "There is little doubt that events of the last five years are signaling a sea of change in *jus ad bellum*. Slowly but surely this body of law is becoming more permissive in response to the demise of nuclear armed bipolar competition and the rise of both transnational terrorists and WMD proliferation."

## CONCLUSION

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation.

—Oliver Wendell Holmes

Since the formation of the UN, there have been nearly 300 interstate conflicts resulting in the deaths of 22 million people. The hope of the joint declaration of President Roosevelt and Prime Minister Churchill "that all nations of the world must come to the abandonment of the use of force" has never materialized.

Success of the UN depended on a Security Council that makes decisions on a case-by-case basis in good faith and enforces them. The UN never matured into the enforcement organization the framers intended and that was required for its success. It is essentially a political organization and as Secretary of State Colin Powell warned, it is close to becoming "a feckless debating society."

In response to an international order of growing terrorism, trans-national crime, "rogue" and "failed" states potentially armed with WMD and will to use them, the National Security Strategy has invoked an escalation of the right of self-defense. Termed preemption, it is in fact a policy of preventive self-defense.

The National Security Strategy policy of preventive self-defense has been condemned throughout the international arena and also within the U.S. However, this condemnation is not universal. It has been shown that a significant amount of validity can be conferred on the National Security Strategy due to: (1) the failure of the UN enforce its charter, essentially abandoning the purposes of the UN (2) the continued use and threat of use of preventive self-defense by many states and previous U.S. administrations (3) state practice (4) customary international law (5) the slowly changing body of international law that is responding to and inferring more significance on the rise of transnational terrorists and WMD proliferation over state sovereignty.

There is no doubt that this is a path fraught with peril. The Global War on Terrorism will go on for decades. Any use of preventive self-defense must retain the principles of *jus ad bellum* and *jus in bello*. It should be a tool of last resort utilized only after careful consideration combined with efforts exercising all elements of national power. However, it is a tool that will be required as the U.S engages and defeats its enemies in the Global war on Terrorism.

WORD COUNT = 6330



## ENDNOTES

<sup>1</sup> George W. Bush, *The National Security Strategy of the United States of America*.

<sup>2</sup> Ibid., 6.

<sup>3</sup> Ibid., 15.

<sup>4</sup> Ibid 15-16.

<sup>5</sup> Joint Chiefs of Staff, *DoD Dictionary of Military Terms*. Washington, D.C., 17 December, 2003; available from <<http://www.dtic.mil/doctrine/jel/doddict/index.html>>; Internet; accessed 19 March 2004.

<sup>6</sup> Ibid.,

<sup>7</sup> U.S. Army Judge Advocate General, *Legal Basis for the Use of Force*. Charlottesville, VA., <[https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/bf25ab0f47ba5dd785256499006b15a4/1af4860452f962c085256a490049856f/\\$FILE/Chapter%201%20-%20Legal%20Basis%20for%20the%20Use%20of%20Force.htm](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/bf25ab0f47ba5dd785256499006b15a4/1af4860452f962c085256a490049856f/$FILE/Chapter%201%20-%20Legal%20Basis%20for%20the%20Use%20of%20Force.htm)>; Internet; accessed 19 March, 2004.

<sup>8</sup> Joint Chiefs of Staff.

<sup>9</sup> Alan Averyt, "The Use of Force, Legitimacy, and the U.N. Charter," *United Nations Association of America Online* 2003 {journal online}; available from <<http://www.unusa.org/issues/Iraq/useofforce.asp>>; accessed 19 Mar 2004.

<sup>10</sup> "Charter of the United Nations," available from <<https://www.un.org/aboutun/charter>>; accessed 19 March 2004.

<sup>11</sup> Charter of the United Nations.

<sup>12</sup> Richard K. Betts, "Striking First: A History of Thankfully Lost Opportunities," *Annual Journal of the Carnegie Council on Ethics and International Affairs* 17 (2003): {database online}; available from Ciao. Accessed 16 September, 2003.

<sup>13</sup> Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force* (London: Routledge, 1993), 73-74.

<sup>14</sup> Charter of the United Nations.

<sup>15</sup> Charter of the United Nations.

<sup>16</sup> Charter of the United Nations.

<sup>17</sup> Timothy Kearly, "Regulation of Preventive and Preemptive Force in the United Nations Charter," *Wyoming Law Review*, 2003, p. 3 (35834 words) [database online]; available from Lexis-Nexis; Accessed 26 September 2003.



<sup>18</sup> Peter Mark, "International Law and the thesis of "Anticipatory self-Defense," *The Progressive Response Online* [journal online]; available from <[http://www.fpif.org/progresp/volume6/v6n30\\_body.html](http://www.fpif.org/progresp/volume6/v6n30_body.html)>; Internet; Accessed 2 January 2004.

<sup>19</sup> Arend and Beck, 131.

<sup>20</sup> Charter of the United Nations.

<sup>21</sup> Derek Jinks, "States Responsibility for the Acts of Private Armed Groups," *Chicago Journal of International Law* 4, no.1 (Spring 2000): 3.

<sup>22</sup> Michael Glennon, "The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law & Public Policy* 25, (2002):539, 546.

<sup>23</sup> Charter of the United Nations.

<sup>24</sup> Charter of the United Nations.

<sup>25</sup> Charter of the United Nations.

<sup>26</sup> Charter of the United Nations.

<sup>27</sup> Charter of the United Nations.

<sup>28</sup> Kearly, 22.

<sup>29</sup> Kearly, 25.

<sup>30</sup> Kearly, 2.

<sup>31</sup> Kearly, 24.

<sup>32</sup> Kearly, 3.

<sup>33</sup> Kearly, 26.

Kearly, 3, 27-29.

<sup>35</sup> Noam Chomsky, "Preventive War 'the Supreme Crime,'" available from <[http://www.zmag.org/content/print\\_article.cfm](http://www.zmag.org/content/print_article.cfm)>; Internet; accessed 31 January 2004.

<sup>36</sup> Charter of the United Nations, Article 107.

<sup>37</sup> Kearly, 27-28.

<sup>38</sup> Hans Kelsen, *The Law of The United Nations* (New York: Fredrick A, Praeger, Inc., 1951), 805.

<sup>39</sup> Thomas Valasek, "New Threats, New Rules, Revising the Law of War," *World Policy Journal* XX (Spring 2003): 3. [database on-line]; available from ProQuest

<sup>40</sup> Valasek 4.

<sup>41</sup> Thomas M. Franck, "Who Killed Article 2 (4)?," *American Journal of International Law* 64, no. 5 (1970): 809-811.

<sup>42</sup> Brian Urquhart, "The Rusty Tools of Peace," *World Policy Journal* 17, no. 4 (Winter 2000/2001): 6.

<sup>43</sup> Glennon, 540.

<sup>44</sup> Glennon, 539.

<sup>45</sup> Glennon, 540.

<sup>46</sup> Franck, 812.

<sup>47</sup> Anthony Clark Arend, "International Law and the Preemptive Use of Military Force," *The Washington Quarterly*, 26, no. 2 (Spring 2002): 90.

<sup>48</sup> Arend, 89.

<sup>49</sup> Arend, 100.

<sup>50</sup> Arend, 100.

<sup>51</sup> Michael N. Schmitt, "Bellum Americanum Revisited: U.S. Security Strategy and the *Jus ad Bellum*," *Military Law Review*, 176(June 2002): 368.

<sup>52</sup> Schmitt, 380-381.

<sup>53</sup> Schmitt, 381-383.

<sup>54</sup> Schmitt, 390-392.

<sup>55</sup> Schmitt, 393-395.

<sup>56</sup> Schmitt, 395-397.



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